

MOTION FILED
NOV 9 - 1998

②

No. 98-591

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF CERTIORARI**

WILLIAM J. KILBERG
Counsel of Record
PAMELA L. HEMMINGER
PATRICIA S. RADEZ
THOMAS G. HUNGAR
ROSS E. DAVIES
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

30 pp

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-591

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**MOTION OF UNITED PARCEL SERVICE
OF AMERICA, INC., FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF CERTIORARI**

Pursuant to this Court's Rule 37.2, United Parcel Service of America, Inc. (UPS) respectfully moves for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to the filing of this brief, but respondent has declined to do so.

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act (ADA) in almost every employment context. Consistent application of the ADA has now been made virtually impossible based on the conflicts among the circuits on a critical threshold issue, the definition of a disability. Because it

operates in every jurisdiction and venue in this nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform approaches to its application. Moreover, UPS often speaks out on issues of concern to American employers before Congress, regulatory agencies, and the federal courts. In this case, UPS is well-situated to present the perspective of large American employers regarding employment law issues.

UPS has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. In particular, UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). Moreover, UPS has opposed interpretations of the ADA similar to those adopted by the Ninth Circuit in this case in both the Tenth and First Circuits. UPS was the prevailing party in a Tenth Circuit ADA case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (filed June 9, 1998), which presents the question whether an individual's ability to mitigate the effects of an impairment demonstrates that the individual does not suffer from a "disability" within the meaning of the ADA. At the same time, UPS is subject to a First Circuit decision that is diametrically opposed to *Murphy*. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

The legal question presented in this case arises with great frequency in ADA cases in a wide variety of circumstances, and its resolution will have a major impact on the ultimate scope of the obligations and burdens imposed on UPS and other American businesses by the ADA.

For all these reasons, UPS has a substantial interest in the questions presented in this case, which include (a) whether monocular vision constitutes a disability under

the ADA, and (b) the legal significance of an impaired individual's ability to compensate for or mitigate the effects of the impairment. While the latter question is not separately identified as such in the petition, it was expressly addressed and resolved by the court of appeals in this case and, because it is an integral element of the entire disability determination, it is fairly encompassed within the questions presented in the petition. Accordingly, UPS seeks leave to file this *amicus* brief supporting certiorari in order to bring to the Court's attention the full scope and importance of the questions presented herein and the compelling need for this Court's intervention to bring clarity and resolution to this confused area of the law.

Respectfully submitted.

WILLIAM J. KILBERG

Counsel of Record

PAMELA L. HEMMINGER

PATRICIA S. RADEZ

THOMAS G. HUNGAR

ROSS E. DAVIES

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 955-8500

Counsel for Amicus Curiae

November 9, 1998

QUESTION PRESENTED

This case presents the question whether the court of appeals erred in holding that monocular vision constitutes a "disability" under the Americans with Disabilities Act (ADA). Fairly encompassed within that question are two related (and extremely important) issues, namely, (a) whether the court of appeals erred in resting its disability determination on the premise that an impaired individual's ability to compensate for or mitigate the effects of an impairment constitutes proof of disability, and (b) whether the court of appeals erred in holding that an employer's mere recognition of an employee's impairment renders the employee disabled within the meaning of the ADA.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT	3
DISCUSSION	4
I. The Courts Of Appeals Are Divided Over The Question Whether Monocular Vision Consti- tutes A "Disability" Within The Meaning Of The Americans With Disabilities Act	6
II. This Case Implicates The Widening Circuit Conflict Over The Significance, If Any, Ac- cording To An Impaired Individual's Mitiga- tion Of The Impairment.....	8
A. Mitigation Is Relevant In The Ninth Cir- cuit, But Only To Prove Disability.....	8
B. In The Sixth And Tenth Circuits, An In- dividual's Ability To Mitigate His Or Her Impairment Justifies A Finding Of No Disability	10
C. Mitigation Is Irrelevant In The First, Third, Seventh, Eighth, And Eleventh Cir- cuits	11

D. Mitigation Is Relevant Some Of The Time In The Fifth Circuit.....	13
E. Review By This Court Is Essential To Eliminate The Multiple Circuit Conflicts Regarding The Legal Significance Of Mitigation Under The ADA	15
III. The Purported "Alternative" Holding Of The Court Below Does Not Mitigate Against Re- view	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Arnold v. United Parcel Service, Inc.</i> , 136 F.3d 854 (1st Cir. 1998)	2,12,15
<i>Aucutt v. Six Flags Over Mid-America, Inc.</i> , 85 F.3d 1311 (8th Cir. 1996)	19
<i>Baert v. Euclid Beverage, Ltd.</i> , 149 F.3d 626 (7th Cir. 1998)	12,13,15
<i>Doane v. City of Omaha</i> , 115 F.3d 624 (8th Cir. 1997), <i>cert. denied</i> , 118 S. Ct. 693 (1998)	7,12
<i>EEOC v. United Parcel Service, Inc.</i> , No. C 97-961- FMS (N.D. Cal.)	2,7
<i>Foreman v. Babcock & Wilcox Co.</i> , 117 F.3d 800 (5th Cir. 1997), <i>cert. denied</i> , 118 S. Ct. 1050 (1998)	18,19
<i>Gilday v. Mecosta County</i> , 124 F.3d 760 (6th Cir. 1997)	10,15
<i>Harris v. H & W Contracting Co.</i> , 102 F.3d 516 (11th Cir. 1996)	13
<i>Kelly v. Drexel University</i> , 94 F.3d 102 (3d Cir. 1996)	18,19
<i>Matczak v. Frankford Candy and Chocolate Co.</i> , 136 F.3d 933 (3d Cir. 1997)	12

<i>Murphy v. United Parcel Service</i> , 141 F.3d 1185, 1998 WL 105933 (10th Cir. 1998), <i>petition for cert. filed</i> , No. 97-1992 (June 9, 1998)	11
<i>Reeves v. Johnson Controls World Services, Inc.</i> , 140 F.3d 144 (2d Cir. 1998)	18
<i>Skorup v. Modern Door Corp.</i> , 153 F.3d 512 (7th Cir. 1998)	19
<i>Still v. Freeport-McMoran, Inc.</i> , 120 F.3d 50 (5th Cir. 1997)	7
<i>Sutton v. United Air Lines, Inc.</i> , 130 F.3d 893 (10th Cir. 1997), <i>petition for cert. filed</i> , No. 97-1943 (June 1, 1998)	10,15
<i>Washington v. HCA Health Services, Inc.</i> , 152 F.3d 464 (5th Cir. 1998)	13,15

STATUTES AND REGULATIONS

29 C.F.R. § 1630.2(j)	4,5
29 C.F.R. § 1630.2(j)(ii)	9
42 U.S.C. § 12102(2)	4
42 U.S.C. § 12102(2)(C)	17
42 U.S.C. § 12112	4

RULES

Sup. Ct. R. 14.1(a).....	15
Sup. Ct. R. 37.6	1

BRIEF *AMICUS CURIAE* OF UNITED PARCEL SERVICE OF AMERICA, INC., IN SUPPORT OF CERTIORARI

United Parcel Service of America, Inc. (UPS) respectfully submits this *amicus curiae* brief in support of certiorari on the question whether monocular vision constitutes a "disability" under the Americans with Disabilities Act (ADA), a question that necessarily encompasses the subsidiary issue of the legal significance, for purposes of disability determinations under the ADA, of an individual's ability to mitigate or compensate for an impairment.¹ UPS believes that this is an issue of national importance to all workers and employers.

INTEREST OF *AMICUS CURIAE*

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act (ADA) in almost every employment context. Consistent application of the ADA has now been made virtually impossible based on the conflicts among the circuits on a critical threshold issue, the definition of a disability. Because it operates in every jurisdiction and venue in this nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform ap-

¹ Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

proaches to its application. Moreover, UPS often speaks out on issues of concern to American employers before Congress, regulatory agencies, and the federal courts. In this case, UPS is well-situated to present the perspective of large American employers regarding employment law issues.

UPS has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. In particular, UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). Moreover, UPS has opposed interpretations of the ADA similar to those adopted by the Ninth Circuit in this case in both the Tenth and First Circuits. UPS was the prevailing party in a Tenth Circuit ADA case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (filed June 9, 1998), which presents the question whether an individual's ability to mitigate the effects of an impairment demonstrates that the individual does not suffer from a "disability" within the meaning of the ADA. At the same time, UPS is subject to a First Circuit decision that is diametrically opposed to *Murphy*. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

The legal question presented in this case arises with great frequency in ADA cases in a wide variety of circumstances, and its resolution will have a major impact on the ultimate scope of the obligations and burdens imposed on UPS and other American businesses by the ADA.

For all these reasons, UPS has a substantial interest in the questions presented in this case, which include (a) whether monocular vision constitutes a disability under the ADA, and (b) the legal significance of an impaired individual's ability to compensate for or mitigate the effects of the impairment. While the latter question is not

separately identified as such in the petition, it was expressly addressed and resolved by the court of appeals in this case and, because it is an integral element of the entire disability determination, it is fairly encompassed within the questions presented in the petition. Accordingly, UPS respectfully submits this *amicus* brief supporting certiorari in order to bring to the Court's attention the full scope and importance of the questions presented herein and the compelling need for this Court's intervention to bring clarity and resolution to this confused area of the law.

STATEMENT

1. The ADA generally prohibits employment discrimination against individuals with disabilities. Under the ADA, an individual is disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The EEOC's regulations provide that an impairment is "substantially limit[ing]" if it significantly restricts the manner in which the individual can perform a major life activity. 29 C.F.R. § 1630.2(j). The EEOC also has published interpretive guidelines that purport to forbid courts from considering mitigation (*i.e.*, the ability to reduce or eliminate the negative effects of an impairment through medication, prosthetics, or other means) when making disability determinations. 29 C.F.R. pt. 1630, app. § 1630.2(j).

Only if an individual is disabled within the meaning of the ADA does the legal inquiry move to the next level -- whether the disabled individual is qualified to perform the essential functions of the job in question with or without reasonable accommodation. 42 U.S.C. § 12112. Thus, the disability determination is a crucial first step in determining the scope and coverage of the ADA.

2. Respondent Hallie Kirkingburg is nearly blind in his left eye. Respondent's former employer, petitioner Albertsons, Inc., terminated respondent's employment as

a truck driver when he failed an eye examination mandated by the United States Department of Transportation. Pet. App. 10a. Respondent later received a waiver of the vision requirement from the Department of Transportation and, when Albertsons refused to reinstate him, he sued, claiming that he was a qualified individual with a disability and a victim of intentional discrimination under the ADA. Pet. App. 11a.

The district court granted summary judgment for Albertsons. Pet. App. 35a-42a. A split Ninth Circuit panel reversed. *Id.* at 1a-33a. In an opinion by Circuit Judge Reinhardt, the majority held that respondent is disabled for purposes of the ADA because he is substantially limited in the major life activity of seeing. Pet. App. 9a, 14a. The court came to this conclusion despite its recognition that respondent has developed the ability to compensate for his impairment. *Id.* at 11a, 14a. Relying on the EEOC's regulations, the court reasoned that respondent's ability to compensate for and mitigate the effects of his monocular vision demonstrates that he suffers from a disability within the meaning of the ADA, because the "manner" in which he performs the major life activity of seeing is different from that of fully sighted persons. *Id.* at 14a-15a & n.4 (citing 29 C.F.R. § 1630.2(j)). Indeed, the court suggested that *all* persons with monocular vision necessarily suffer from a "disability" under the ADA because they see in a different "manner" than fully sighted individuals. *Id.* at 14a-15a ("[Respondent] sees using only one eye; most people see using two. Accordingly, . . . he is disabled.").

DISCUSSION

Proof that an individual suffers from a "disability" within the meaning of the ADA is a prerequisite to the applicability of the statute in most cases, and the standards governing the disability inquiry are therefore of central importance in determining the extent of the obligations and burdens imposed by the ADA. Despite the

facial clarity of the ADA's definition of "disability," however, this question continues to be heavily litigated and hotly disputed in a wide variety of contexts, and the courts of appeals have been unable to reach any consensus regarding the meaning or proper interpretation of the statutory definition. Indeed, it is fair to say that this is the ground on which most ADA litigation is fought, and that ground is currently divided among several warring camps.

In the first place, with respect to the particular impairment at issue here -- monocular vision -- the courts of appeals are divided over the question whether it constitutes a "disability" for purposes of the ADA. That circuit conflict is significant and worthy of resolution by this Court, but it is also symptomatic of a wider and more fundamental disagreement among the lower federal courts regarding the very nature of the disability determination called for under the ADA.

In the decision below, the Ninth Circuit relied on the EEOC regulations in concluding that respondent's ability to compensate for his impairment, far from providing a basis for finding that he was not disabled, instead supported the conclusion that he *was* disabled because the "manner" in which he saw was different from that of unimpaired persons. A second and related (but distinct) line of authority follows the EEOC interpretative guidelines in holding that any ability to mitigate the adverse effects of an impairment should simply be ignored for purposes of determining whether the impairment constitutes a disability. These two approaches stand the ADA on its head, requiring employers to treat as disabled those employees who can and do function equally as well as non-impaired individuals with respect to major life functions.

A third line of authority, by contrast, adheres to the plain language of the ADA and rejects the notion that courts should ignore reality in determining whether an individual suffers from an impairment that is sufficiently

severe to constitute a disability. In these jurisdictions (which include the Sixth and Tenth Circuits), an individual's ability to mitigate the effects of an impairment in the real world (e.g., by wearing glasses or a hearing aid, taking medication, and so forth) is taken into account in the disability determination.

Finally, the Fifth Circuit has recently charted yet a fourth course in this area, adopting a hybrid approach under which some types of mitigation are to be considered in making the disability determination, but others are not. This Court's review is essential to relieve employers and litigants from the impossible situation created by this jumble of inconsistent and conflicting precedents.

In purporting to express an "alternative" ground for its decision, moreover, the court below compounded the error of its disability analysis and in the process appears to have created yet another related circuit conflict. Departing from settled law in at least half-a-dozen circuits, the court seems to have suggested that an employer's mere knowledge of an individual's impairment may justify a finding of disability on the ground that the impaired individual is "regarded as" disabled within the meaning of the ADA. Any such holding would create a clear circuit conflict and would dramatically expand the scope of employer liability under the ADA in a manner that neither Congress nor any other circuit court anticipated. Further review is warranted to avoid any such distortion of the ADA.

I. The Courts Of Appeals Are Divided Over The Question Whether Monocular Vision Constitutes A "Disability" Within The Meaning Of The Americans With Disabilities Act

The court of appeals below squarely held that monocular vision constitutes a disability under the ADA. Pet. App. 14a-15a. The Eighth Circuit has reached the same result, in a case that was relied upon by the court

below. *Id.* at 15a (citing *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998)).

The Fifth Circuit, by contrast, has reached precisely the opposite result. In *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997), the court held that an individual with monocular vision was not disabled for purposes of the ADA. Rejecting the plaintiff's allegations that he was limited in the major life activities of seeing and working, the court reasoned that the realities of the plaintiff's capabilities precluded a finding of disability. The plaintiff was not substantially limited in the major life activity of seeing because, "although [plaintiff's] peripheral vision is limited by his partial blindness, [plaintiff] is able to perform normal daily activities." *Id.* at 52. Similarly, because the plaintiff's impaired vision did not significantly restrict his ability to perform either a class of jobs or a broad range of jobs, he was not substantially limited in the major life activity of working. *Id.*

Thus, monocular vision is not a disability in the Fifth Circuit, while in the Eighth and Ninth Circuits it is. This inexplicable disparity places national employers in an untenable position, forcing them to choose between three unacceptable and unworkable alternatives: (1) adopt a patchwork of inconsistent employment policies depending on the vagaries of each circuit's reading of the ADA; (2) ignore serious and important safety considerations by adopting the Eighth and Ninth Circuit's approach in all jurisdictions; or (3) continue to enforce stringent safety requirements and risk massive litigation costs in circuits that view monocular vision as a disability. The problem is exacerbated by the fact that the EEOC frequently files lawsuits which are nationwide in scope, seeking to employ the law of the circuit in which the filing occurs. Thus, for example, in *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.), the EEOC seeks to apply the extreme position adopted by the Ninth Circuit

to UPS operators throughout the country. This Court should step in to resolve the conflict among the circuits on this issue and alleviate the difficulties faced by employers attempting in good faith to comply with the potentially conflicting legal obligations imposed by the ADA, state tort law, and other regulatory regimes.

II. This Case Implicates The Widening Circuit Conflict Over The Significance, If Any, Accorded To An Impaired Individual's Mitigation Of The Impairment

Nine courts of appeals (including the court below) have now addressed the question of the legal significance of mitigation in determining whether an individual is disabled under the ADA. Those efforts have yielded widely divergent results on this frequently recurring question. Indeed, as discussed below, four different conflicting interpretations of the ADA's definition of "disability" have been adopted by these various courts, with the result that the outcome of ADA cases varies widely by jurisdiction depending on the nature of the mitigation rule that has been adopted in the relevant circuit.

A. Mitigation Is Relevant In The Ninth Circuit, But Only To Prove Disability

In this case, the court below held that respondent was disabled for purposes of the ADA at least in part because "his brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." Pet. App. 14a. In the Ninth Circuit's view, the fact that respondent is able to compensate for his impairment supports a finding that he is disabled, because his ability to compensate for or mitigate the impairment means that "the *manner* in which he sees differs significantly from the *manner* in which most people see." *Id.* (emphasis in original); see also *id.* at 15a n.4 ("Whether an individual is disabled

within the meaning of the Act does not depend . . . on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons.").

Under the Ninth Circuit's approach, therefore, an individual's ability to mitigate or compensate for an impairment such that the individual is not significantly restricted in performing a major life activity does not demonstrate the absence of disability; to the contrary, it leads to the counterintuitive conclusion that the individual *is* disabled. According to the Ninth Circuit, the very fact of mitigation supports a finding of disability because it proves that the impaired individual performs the affected major life activity in a different "manner" than unimpaired persons (even if the "disabled" individual is able to perform at the same ability level as unimpaired persons).²

² Contrary to the Ninth Circuit's standard, which presumes disability whenever the manner in which an individual performs a major life activity is not identical to the routine in the general population, the regulations promulgated under the ADA provide that an impairment substantially limits a major life activity only when an individual is "[s]ignificantly restricted as to the condition, manner or duration under which [that] individual can perform a particular major life activity as compared to . . . the average person in the general population" 29 C.F.R. § 1630.2(j)(ii) (emphasis added). As noted in the *amicus curiae* brief of the American Trucking Association in this case, the Ninth Circuit's failure to adhere to this interpretation of the ADA conflicts with the decisions of numerous other courts of appeals.

While the court below was directly concerned with a particular impairment -- monocular vision -- its holding is equally applicable to the wide array of other impairments that can be mitigated in some way, whether through medication, prosthetics, or other treatments or compensating mechanisms. Under the Ninth Circuit's approach, mitigation automatically transforms the impairment into a disability under the ADA, because mitigation by definition entails performing the affected major life activities in a manner that is (by virtue of the mitigation itself) different from the (unmitigated) manner characteristic of unimpaired persons. As a result, the Ninth Circuit's rule implicates every ADA case that requires a court to consider the relevance of mitigation to a disability determination -- in other words, every case except those rare ones in which there is nothing to be done to ameliorate the effects of an individual's impairment.

B. In The Sixth And Tenth Circuits, An Individual's Ability To Mitigate His Or Her Impairment Justifies A Finding Of No Disability

In direct contrast to the approach adopted by the court below, the Sixth and Tenth Circuits have adopted a common sense approach dictated by the plain language of the ADA. Those circuits hold that an individual's ability to mitigate his or her impairment such that the individual can perform major life activities leads to the conclusion that the individual is *not* disabled. The reasoning of these courts is straightforward and clearly correct. As the Tenth Circuit has explained, "[i]n making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *petition for cert. filed*, No. 97-1943 (June 1, 1998); *accord Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and

dissenting in part) ("[W]here an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, I believe the ADA provides no protection."); *id.* at 768 (Guy, J., concurring in part and dissenting in part) ("[A] person with a 'controlled' medical problem or condition [who is] completely functional ... should be evaluated as such."); *Murphy v. United Parcel Service*, 141 F.3d 1185, 1998 WL 105933, at *2 (10th Cir. 1998) (unpublished opinion) (disability determinations "should take into consideration mitigating or corrective measures utilized by the individual") (quoting *Sutton*, 130 F.3d at 902), *petition for cert. filed*, No. 97-1992 (June 9, 1998).

Under the rule in the Sixth and Tenth Circuits, the fact that respondent has developed the ability to compensate for his impairment would have been taken into account as a potential basis for finding that he was not in fact disabled. In these circuits, his ability effectively to mitigate the effects of his impairment means that he is not "substantially limited" in a major life activity. In contrast, under the rule adopted by the court below, the identical fact pattern led to precisely the opposite conclusion: Respondent's ability to compensate for his impairment did not provide a basis for finding that he was *not* disabled, but instead supported the conclusion that he *was*. The conflict between these two diametrically opposed approaches to the mitigation issue is stark and unavoidable, and intervention by this Court is therefore necessary.

C. Mitigation Is Irrelevant In The First, Third, Seventh, Eighth, And Eleventh Circuits

Relying on the EEOC's interpretative guidance, several courts of appeals have adopted a third approach to the mitigation issue, holding that mitigating measures are simply irrelevant to the disability determination and must be ignored altogether. In *Doane*, for example, the

Eighth Circuit held that although "[The plaintiff's] brain has mitigated the effects of his impairment, . . . analysis of whether he is disabled does not include consideration of mitigating measures." 115 F.3d at 627. Accordingly, even though the plaintiff was able to "function normally" when his ability to mitigate was taken into account, the court nonetheless held that he was "disabled," and therefore entitled to the protection of the ADA. *Id.* at 627-28.

The First, Third, Seventh, and Eleventh Circuits have reached essentially the same conclusion. *See, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866-67 (1st Cir. 1998) ("[T]he ADA protects Arnold from discrimination . . . without regard to whether some of his limitations are ameliorated through medication or other treatment.");³ *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997) ("[D]isabled individuals who control their disability with medication may still invoke the protections of the ADA."); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998) ("We determine whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, without regard to the availability of mitigating measures . . ."); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996) (plaintiff's impairment should be evaluated "in the absence of mitigating measures").

³ To save the EEOC's ban on consideration of mitigation from some of its more patently unreasonable consequences, the First Circuit crafted what amounts to a *de minimis* exception for "simple, inexpensive [and] . . . permanent" remedies such as "eyeglasses." *See Arnold*, 136 F.3d at 866 n.10. The court offered no principled basis for the creation of this minor exception, given its reading of the statute.

Plainly, the rule followed in these circuits is at odds with *both* the decision below *and* with the approach followed in the Sixth and Tenth Circuits. Unlike the Ninth Circuit in this case, which looked to evidence of mitigation as a basis for finding a disability, and also unlike the Sixth and Tenth Circuits, which evaluate a plaintiff in his or her mitigated state, these five circuits *preclude* consideration of mitigation as part of the disability inquiry. Needless to say, the rule adopted by these five circuits leads to very different results than the rule followed in the Sixth and Tenth Circuits.⁴

D. Mitigation Is Relevant Some Of The Time In The Fifth Circuit

Finally, the Fifth Circuit has adopted yet another approach to the mitigation issue, opting to permit consideration of mitigation in some circumstances but not others. *See Washington v. HCA Health Services, Inc.*, 152 F.3d 464, 467-68 (5th Cir. 1998). After considering the terms of the ADA, the conflicting legislative history of

⁴ Perhaps less obviously, the approach followed by the First, Third, Seventh, Eighth, and Eleventh Circuits (*i.e.*, those circuits that ignore mitigation altogether) can also lead to different results than those entailed by the rule announced by the Ninth Circuit in this case. Many individuals who engage in mitigation efforts to minimize or eliminate the effect of an impairment are not severely impaired in any event, and thus might not qualify as "disabled" within the meaning of the ADA even if their mitigation efforts were ignored in making the disability determination. In the Ninth Circuit, by contrast, such individuals might be found to be disabled *by virtue of the fact that they mitigate the effects of their impairment* and thus perform a major life activity in a significantly different "manner" than unimpaired persons.

the Act, and the EEOC's interpretative guidelines, the court concluded that, "Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC. Thus, we will follow the EEOC Guidelines and the legislative history, but we read them narrowly." 152 F.3d at 470.

Accordingly, the *Washington* court adopted a hybrid view of the legal significance of mitigation: "[O]nly serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history -- diabetes, epilepsy, and hearing impairments -- will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his pro[s]thesis every morning or take his medication with some continuing regularity." *Id.* The court also defined the sorts of mitigation that are to be taken into account: "If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state." *Id.* at 470-71.

Both aspects of the Fifth Circuit's rule conflict with the approach followed below. The Fifth Circuit refuses to consider mitigation at all in some cases, whereas the decision below indicates instead that mitigation is directly relevant to the determination of the *manner* in which an individual performs major life activities. On other hand, the Fifth Circuit does consider mitigation in some instances as a basis for concluding that an impairment does *not* rise to the level of a disability, precisely the opposite purpose for which the court below considers such evidence.

E. Review By This Court Is Essential To Eliminate The Multiple Circuit Conflicts Regarding The Legal Significance Of Mitigation Under The ADA

This Court should grant the petition for certiorari in this case to resolve the four-way circuit conflict regarding the proper significance of mitigation for purposes of the disability inquiry. The courts of appeals have explicitly recognized the existence of circuit conflicts on this issue (*see, e.g.*, Pet. App. 15a n.4; *Arnold*, 136 F.3d at 866; *Washington*, 152 F.3d at 469, 471; *Gilday*, 124 F.3d at 762-63; *Baert*, 149 F.3d at 629-30; *Sutton*, 130 F.3d at 901 nn.7, 8), but have nonetheless chosen to perpetuate, and indeed exacerbate, this state of affairs, leaving employers in an impossible situation in which they are confronted with mutually inconsistent obligations and standards in different jurisdictions.

The mitigation issue was not separately identified as a distinct question in the petition filed in this case. *See* Pet. i. That fact does not militate against review of the mitigation issue here, however, because the that issue is "fairly included" within the question whether monocular vision constitutes a disability under the ADA. *See* Sup. Ct. R. 14.1(a). Indeed, resolution of the circuit conflict over the significance of mitigation evidence is a necessary first step in deciding whether monocular vision constitutes a disability because, as the opinion below reveals, respondent claims the ability to mitigate the effects of his impairment. Pet. App. 14a-15a. The court below took that fact into account and relied upon it in concluding that respondent was disabled; as discussed above, other circuits would either have ignored that fact altogether in conducting the disability inquiry or, alternatively, would have relied on that fact as a basis for concluding that respondent is *not* disabled. Thus, the first question presented in the petition squarely presents the mitigation issue that has divided the circuits.

Absent immediate intervention by this Court, the question whether a particular individual is disabled, and thus entitled to claim the protections of the ADA, will continue to depend more on where the individual lives than on the nature of the impairment at issue. Congress plainly did not intend that the ADA be given widely varying interpretations and scope in different parts of the country, but that is the present state of affairs nonetheless. Only this Court is in a position to correct this glaring problem. The courts of appeals have now had ample time to consider and implement the various possible interpretations of the ADA, and all aspects of the question have been thoroughly fleshed out in the various opinions cited above. Accordingly, there is no reason to delay consideration of this issue until a later time, as it is squarely presented in this case and cries out for prompt resolution by this Court. National employers like UPS should not continue to be forced to engage in the wasteful, expensive, and ultimately fruitless endeavor of attempting to comply with competing and mutually inconsistent interpretations of the same statute.⁵

⁵ The question of the proper legal significance to be afforded mitigation evidence is also pending before this Court in *Murphy v. UPS, Inc.*, No. 97-1992, and the Court recently invited the Solicitor General to file a brief expressing the views of the United States in that case. The Court may therefore wish to delay consideration of the petition in this case pending the filing of the Solicitor General's brief in *Murphy* and the Court's disposition of the *Murphy* petition. UPS respectfully suggests that it would be appropriate for the Court to grant certiorari in both this case and *Murphy* in order to address all aspects of the mitigation issue at one time. Alternatively, if the Court elects to address that issue exclusively in *Murphy*, this petition should be held pending the final disposition of *Murphy* and then resolved as appropriate in light of that disposition.

III. The Purported "Alternative" Holding Of The Court Below Does Not Militate Against Review

The court below purported to supply an "alternative" ground for its decision, stating that respondent may also qualify as "disabled" under the "regarded as" prong of the ADA's disability definition. Pet. App. 16a. This allegedly "alternative" ground does not militate against review in this case, however, because it is entirely dependent on the court's initial conclusion that monocular vision constitutes a disability under the definition discussed in Parts I and II above. Indeed, if it truly were an alternative ground for the judgment below, the court's analysis of the "regarded as" issue would conflict with the decisions of numerous other circuits, further justifying review in this case.

1. The "regarded as" prong of the ADA's definition of disability provides that an individual is entitled to the protections of the Act if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). In this case, respondent claims that one of Albertson's managers described him as "blind in one eye or legally blind." Pet. App. 17a. The court of appeals held that this statement, standing alone, was sufficient to create a "genuine issue of fact regarding whether Albertson's perceived [respondent] as disabled" within the meaning of the ADA. *Id.* at 16a.

Contrary to the court of appeals' suggestion (Pet. App. 16a), this conclusion does not constitute an "alternative" ground for the judgment below, because the court's "regarded as" holding is entirely dependent on its preceding determination that monocular vision constitutes a disability under the first prong of the definition. Simply stating that an individual is "blind in one eye or legally blind" cannot support a finding that the individual is "regarded as" disabled unless that statement

is the legal equivalent of saying "your monocular vision impairment renders you substantially limited in the performance of a major life activity" -- which would be true only if monocular vision in fact constituted a disability as a matter of law. Therefore, this supposed alternative ground is derivative of, and not an alternative to, the court's initial conclusion that monocular vision is in fact a disability under the ADA.

2. Any other reading of the Ninth Circuit's decision would create a clear circuit conflict over the interpretation of the "regarded as" prong. Numerous courts of appeals have held that an employer's mere recognition of an employee's impairment does not in itself prove that the employee is "regarded as" disabled, because it does not demonstrate that the impaired employee was viewed as being substantially limited in the performance of a major life activity.

In the leading case of *Kelly v. Drexel University*, 94 F.3d 102 (3d Cir. 1996), for example, the plaintiff, who suffered from a severe joint disease, lost his job. He sued under the ADA, claiming that his employer had terminated his employment because it regarded him as disabled. In *Kelly*, as in this case, the plaintiff's evidence consisted of (1) the employer's awareness of the employee's impairment, and (2) an adverse employment action. *Id.* at 109; Pet. App. 16a-17a. In *Kelly*, as in this case, the employer replied that it did not view the employee as disabled. *Kelly*, 94 F.3d at 109; Pet. App. 13a. The *Kelly* court affirmed summary judgment for the employer, holding that "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate . . . that the employer regarded the employee as disabled" *Kelly*, 94 F.3d at 109.

Other courts of appeals consistently arrive at the same conclusion as the *Kelly* court. See, e.g., *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 153 (2d Cir. 1998) (quoting and relying on *Kelly* in rejecting "regarded as" claim); *Foreman v. Babcock & Wilcox*

Co., 117 F.3d 800, 806-07 & n.10 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) ("It is not enough for [plaintiff] to show that [defendant] was aware of her impairment; instead [plaintiff] must show that [defendant] knew of the impairment and believed that she was substantially limited because of it.") (emphasis added); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) ("The mere fact that [defendant] had such knowledge [of plaintiff's impairment], however, does not show that [defendant] regarded [plaintiff] as having a disabling impairment.").

In the present posture of this case, it is undisputed that respondent is essentially blind in one eye. Pet. App. 14a. Thus, the statement attributed to Albertsons' manager is nothing more than an accurate description of respondent's impairment. As the cases above make clear, every other circuit to address the question has rejected the notion that simply recognizing an individual's impairment constitutes a discriminatory perception of disability sufficient to entitle the impaired individual to the protections of the ADA under the "regarded as" prong of the statute. If the Ninth Circuit's discussion of the "regarded as" prong were truly intended to be an independent ground for the judgment below, it would necessarily conflict with all of the circuit precedents discussed above, thereby providing still further justification for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's consideration of *Murphy v. UPS*, No. 97-1992, and then disposed of in accordance with the Court's resolution of that case.

Respectfully submitted.

WILLIAM J. KILBERG
Counsel of Record
PAMELA L. HEMMINGER
PATRICIA S. RADEZ
THOMAS G. HUNGAR
ROSS E. DAVIES
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

November 9, 1998